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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MAURICE HUBERT LEWIS, Defendant and Appellant.	B204093 (Los Angeles County Super. Ct. No. BA316997)

APPEAL from a judgment of the Superior Court of Los Angeles County, Norman J. Shapiro, Judge. Affirmed.

Marilee Marshall & Associates, Marilee Marshall and Jennifer M. Hansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Karen Bissonnette, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Maurice Lewis, appeals the judgment entered following his conviction, by jury trial, for assault with a firearm, making criminal threats, brandishing a firearm at the occupant of a motor vehicle, possession of a firearm by a felon and possession of ammunition by a felon, with firearm use and prior serious felony conviction findings (see Pen. Code, §§ 245, 422, 417.3, 12021, subds. (a)(1) and (c)(1), 12316, 12022.5, 667, subd. (b)-(i)). Lewis was sentenced to state prison for a term of 19 years and 8 months.

The judgment is affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), we find the evidence established the following.

1. *Prosecution evidence.*

On January 20, 2007,[1] Lloyd Collins, an automobile repossessor employed by Pirate Recovery, received an order from Lobel Financial to repossess defendant Lewis's 1999 Monte Carlo. By checking the Monte Carlo's vehicle identification number in Pirate Recovery's computer system, Collins determined that he and co-employee Angela Daywalt had repossessed the same car in September 2005.

In the early morning hours of January 22, Collins and Daywalt went to Lewis's duplex apartment at 5514 South Budlong Avenue to repossess the car. Daywalt was driving the tow truck, with Collins in the passenger seat. They found the Monte Carlo parked in an alley next to the duplex. A car alarm went off the moment Collins touched the towing cables to the Monte Carlo. Collins continued to attach the cables. A woman, subsequently identified as Forever Merritt, came to the front door of the duplex and started yelling that they were not going to take the car. Shortly thereafter, Lewis appeared in the doorway holding a gun at his side. He pointed the gun at Daywalt and

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[1] All further calendar references are to the year 2007 unless otherwise specified.

yelled, "You are not going to fucking take my car." Hearing this threat, Collins told Daywalt to drive around the corner. After Daywalt moved the tow truck, Collins could see Lewis standing seven to ten feet away, pointing a long gun at him. Collins testified he was not particularly surprised by this because it was not unusual in his line of work for people to point guns at him.

Lewis told Collins he "wasn't going to take his fucking car again," and that he "might as well drop that shit now before he caps me off." Collins told Lewis to put the gun away, but Lewis said, "Fuck you. Put my shit down before I fucking cap you off." When Lewis did not lower his gun, Collins became alarmed. Believing he might be shot, Collins backed away with his hands out at his side so Lewis could see he wasn't armed. Collins radioed Daywalt to drive onto the next block and said he would meet her there. Daywalt called 911.

As Collins approached the tow truck, he saw Merritt drive up in a blue Nissan Altima. Merritt tried to get around to the front of the tow truck, in an apparent attempt to prevent Daywalt from taking the Monte Carlo. Daywalt blocked her path with the tow truck. Merritt made a U-turn and drove back the way she came. Shortly thereafter, the Altima came speeding past Collins again; this time Lewis was driving. When Lewis couldn't get around the tow truck, he hopped out of the Altima and ran toward Collins. As Lewis ran, he pulled out a handgun and pointed it at Collins. Collins turned around to flee and ran smack into a palm tree, hitting his head. He managed to keep going and reach the tow truck.

A car chase then ensued, during which Lewis, driving the Altima with Merritt as a passenger, chased after the tow truck. Daywalt, who was still talking to the police, gave them her location. Daywalt was driving in a zig-zag pattern on the wrong side of the street to elude Lewis. When a patrol car arrived on the scene, Lewis drove off.

At about 6:30 a.m., the police took Lewis into custody outside the duplex. After obtaining Merritt's consent, officers searched Lewis's apartment. Officer Marco Sobrino testified they did not find any guns, although they had been unable to perform a thorough

search because the apartment was so cluttered, and because they only searched for 15 or 20 minutes. Sobrino saw a blue Altima at the scene, but he did not search it.

On February 9, about three weeks after the incident, police searched Lewis's apartment again, this time pursuant to a search warrant. They found a Remington 870 shotgun on the floor of the bedroom closet. On the top shelf of the closet, under some clothing, was a box containing 19 shotgun shells. These shells fit the Remington. Both Collins and Daywalt subsequently identified this shotgun as being the one Lewis had pointed at them. In the living room, officers found various documents bearing Lewis's name, including utility bills, a notice from Lobel Finance regarding the Monte Carlo, and an auto insurance notice.

Detective Bradley Mossie, who had obtained the search warrant, described the duplex as "a long, narrow style of apartment. It's not very big. [¶] But it took over an hour to search it, because of the volumes of boxes and television sets and papers and clothes and everything imaginable piled . . . waist high and higher all over the place. It just took a very long time to search thoroughly."

Mossie, who also serves as a firearms instructor, explained that the only difference between a rifle and a shotgun is that a rifle's barrel has grooves on the inside called rifling. The rifling puts a spin on the bullet to ensure distance and accuracy. By contrast, a shotgun barrel has no rifling and is completely smooth. Mossie testified "the difference between a rifle and a shotgun is determined solely in the interior of the barrel, which is not visible [from the] outside of the firearm." He also testified that "Remington sells that same gun, an 870, with a rifle barrel."

2. *Defense evidence.*

Forever Merritt testified she has lived in the apartment at 5514 South Budlong since 2002. She and Lewis have been together since 2000 and they have two children, a 21-month-year-old and a 6-year-old.

According to Merritt, Lewis did not live at the Budlong apartment, although he received mail there. The utility bills were addressed to Lewis, although Merritt paid them. Merritt testified Lewis "never really stayed there in the residence with me.

The only time he really came was to visit his kids or to come and babysit." However, she acknowledged that when she filed a domestic violence complaint against Lewis in 2004, she told police he did live at the apartment.

Merritt testified that on the morning of the incident, Lewis came over at about 5:30 a.m. to babysit so Merritt could go to work. When Merritt saw someone messing with the Monte Carlo, she went outside and yelled at him. The man told her, "Shut up. Go back in the house. Mind your own business." Lewis came out when the car alarm went off. Merritt testified she owned a Chevy Malibu and that neither she nor Lewis owned an Altima.

Merritt testified the Remington shotgun police found in the bedroom closet did not belong to Lewis. Merritt had received it from Lewis's sister Monique in February, after the repossession incident had taken place. Monique took the shotgun and some ammunition over because "her sons are old enough to where they can go into her closet and look and find things. And . . . her mother was staying there, and all of her rooms were open, and she just didn't want anyone to have access to [the gun]." Merritt testified she was just taking care of the shotgun as a favor until Monique found some place else to store it.

On cross-examination, Merritt acknowledged the address on her driver's license was 10045 South Harvard Blvd., not 5514 South Budlong Avenue. South Harvard is the address Merritt has listed with the DMV since 1998, and the address she provided when she renewed her license in 2006. When she reported the 2004 domestic violence incident, Merritt told police she lived at the South Harvard address, and that Lewis lived at the Budlong duplex.

CONTENTIONS

1. The trial court erred by refusing to let Lewis discharge his privately retained trial attorney.

2. The trial court erred by denying Lewis's new trial motion.

DISCUSSION

1. *Trial court properly denied Lewis's request to discharge retained counsel.*

Lewis contends the trial court erred when it refused to let him discharge his trial attorney. This claim is meritless.

a. *Background.*

At his preliminary hearing on May 2, Lewis was represented by privately retained counsel. At the arraignment on May 16, this attorney was relieved and a public defender was appointed to represent Lewis. At a pretrial conference on June 14, Lewis appeared in court with a new privately retained attorney, Alan Ross, and the public defender was relieved.

The case came on for trial on July 23. Jury selection began that morning and continued until 4:00 p.m. When proceedings resumed the next morning, the trial court noticed Lewis was wearing jail clothes. The following colloquy occurred:

"The Court: Would you like to put on the clothing you had on yesterday, the civilian clothing, while we are in front of the jury today?

"The Defendant: Well, first of all, I want a *Marsden*[2] motion to relieve my counsel.

"The Court: It's a little late for that. We are in jury selection."

When Lewis complained that he was not being adequately represented, the trial court again asked if he wanted to change into civilian clothing. Lewis said he did and the court took a brief recess so Lewis could change. When proceedings resumed a few minutes later, Lewis refused to return to the courtroom. The trial court had him brought in to ask if he really wanted to absent himself from the proceedings. The following colloquy occurred:

"The Defendant: I want this lawyer relieved.

"The Court: All right. Well, that's not going to happen, sir.

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[2] *People v. Marsden* (1970) 2 Cal.3d 118 (a motion to discharge appointed counsel).

"The Defendant: I paid for him, and I . . . can't fire him? Is that what you telling me?

"The Court: Well, he's your lawyer at this point, and we are into the proceedings, and it's too late to [¶] . . .[¶] make any changes at this point.

"The Defendant: No, no, no.

"The Court: Let me explain to you, if that was the case, you could hire lawyer after lawyer, and on the eve of trial or just the beginning of trial, fire your lawyer, and then we'd never get the case tried. So that's [¶] . . .[¶] just the way it happens to be. Do you want to be here or not, sir?

"The Defendant: Uhn-uhn. I don't want this lawyer."

The trial court asked Lewis why he wanted to replace Ross:

"The Defendant: Because he's been lying to me the whole time –

. . . . . .

. . . . . .

"The Defendant: Lied to me about a whole lot of stuff. He lied to my family.

"The Court: What, specifically?

"The Defendant: The whole time he took this case, he hasn't done anything.

"The Court: All right. What else?

"The Defendant: Just lies after lies. [¶] . . .[¶] [J]ust I know I am not being represented. That's all.

. . . . . .

. . . . . .

"The Court: Mr. Ross, your client is indicating you have lied to him throughout the proceedings and you haven't done anything. Do you want to address that, sir?"

When the trial court offered to exclude the prosecutor, defense counsel Ross said, "If it's a *Marsden* motion, she should be." After the courtroom was cleared, defense counsel explained that, although there had been an initial problem obtaining the case file from the Public Defender, "when I did get the file, I immediately went through it. I redacted the police report. I made sure that [Lewis] had a copy, his witnesses had a

copy. And I provided a copy of the preliminary hearing transcript to both Mr. Lewis and his witness. [¶] So at this point we were aware of what the evidence was in this case . . . . [¶] I did [an] analysis of the sentencing options in this case. I delivered that to Mr. Lewis. I did a resume of the evidence in the case."

Ross said he "gave Mr. Lewis my best analysis of the case. I didn't tell him that the case was impossible to win. I said it's got it's problems, but there's some areas of reasonable doubt here, particularly about the first three charges. [¶] And at that point . . . he seemed to get along with me very well. But as we progressed into trial, I started to get complaints from the girlfriend, the witness, that I hadn't made any pretrial motions, and then Mr. Lewis said, 'You didn't make any pretrial motions.' " Ross understood that Lewis's first retained counsel had said he would move to dismiss the information, but Ross's own analysis indicated there was no basis for such a motion. Merritt and Lewis were unhappy about this. They also felt Ross should have made a *Pitchess*[3] motion, but again Ross felt it was unwarranted.

The trial court ruled that "the record fails to demonstrate that continued representation by Mr. Ross would deprive the defendant of representation, and the *Marsden* motion is denied."

b. *Legal principles.*

When a defendant seeks to discharge appointed counsel under *People v. Marsden, supra,* 2 Cal.3d 118, fairly strict requirements must be met. "*Marsden* motions are subject to the following well-established rules. ' " 'When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first

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[3] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (a discovery motion for police personnel records).

appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations].' [Citations.]" ' " (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085.)

However, the rule is quite different if a defendant is seeking to discharge retained counsel. "[W]hen a criminal defendant makes a timely motion to discharge his retained attorney he should not be required to demonstrate the latter's incompetence, as long as the discharge will not result in prejudice to the defendant or in an unreasonable disruption of the orderly processes of justice." (*People v. Ortiz* (1990) 51 Cal.3d 975, 979.) The "right to discharge . . . retained counsel, however, is not absolute. The trial court, in its discretion, may deny such a motion if discharge will result in 'significant prejudice' to the defendant [citation], or if it is not timely, i.e., if it will result in 'disruption of the orderly processes of justice' [citations]. . . . [T]he 'fair opportunity' to secure counsel of choice provided by the Sixth Amendment 'is necessarily [limited by] the countervailing state interest . . . in proceeding with prosecutions on an orderly and expeditious basis, taking into account the practical difficulties of "assembling the witnesses, lawyers, and jurors at the same place at the same time." ' The trial court, however, must exercise its discretion reasonably: 'a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.' [Citation.]" (*Id.* at pp. 983-984.)

c. *Discussion.*

(1) *Trial court used the proper standard.*

Lewis initially characterizes *Ortiz* as holding that, "in contrast to situations involving appointed counsel, a defendant may discharge his retained counsel of choice *at any time* with or without cause." (Italics added.) But, as just noted *ante*, what *Ortiz* said was that a "trial court, *in its discretion*, may deny such a motion if . . . it is not timely, i.e., if it will result in 'disruption of the orderly processes of justice.' " *People v. Ortiz, supra,* 51 Cal.3d at p. 983, italics added.)

Lewis next asserts we owe the trial court's ruling no deference because the court incorrectly conducted a *Marsden* hearing, instead of an *Ortiz* hearing, and therefore judged his request by the wrong standard, i.e., that he had to show either Ross's representation had been incompetent or that they had an irreconcilable conflict. Lewis also argues the trial court incorrectly believed he had to demonstrate that continued representation by Ross would cause him prejudice, whereas he "only had to assert that he wanted to discharge his retained attorney."

We do not agree the trial court conducted a *Marsden* hearing. It is true that when the trial court denied Lewis's request it said, "the *Marsden* motion is denied." However, that comment was made *after* Lewis and then Ross already had referred to the request as a *Marsden* motion.[4] The Attorney General argues, "Under the circumstances, it appears that the trial court may have simply been referring to the motion as a '*Marsden* motion,' using appellant's phraseology, simply in order to avoid confusing appellant."

> That may well be true. Certainly, the record shows the trial court was aware Lewis had retained counsel because the court's parable, about the danger of a defendant eternally postponing trial, was phrased in terms of the defendant "hiring" and "firing" one lawyer after another.

In any event, it matters not what the trial court called the proceedings, but whether it considered the appropriate factors when it denied Lewis's request. (See *People v. Lara* (2001) 86 Cal.App.4th 139, 156 [where trial court improperly relied on *Marsden* rather than *Ortiz*, issue on appeal was "whether the court's ruling on the supposed *Marsden* motion effectively addressed the issues it should have considered in the course of an *Ortiz* motion regarding retained counsel"].)

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[4] Lewis initially told the trial court, "Well . . . I want a *Marsden* motion to relieve my counsel." Defense counsel then repeated this, saying: "If it's a *Marsden* motion, [the prosecutor] should be [excluded]." It was only after these two comments had been made that the trial court referred to Lewis's request as a *Marsden* motion.

Lewis argues the record demonstrates the trial court did not consider the appropriate factors because, when it denied his request, the court said, "[T]he record fails to demonstrate that continued representation by Mr. Ross would deprive the defendant of representation . . . ." Lewis asserts this states the *Marsden* test, not the *Ortiz* test. Not so. The *Marsden* test is whether the defendant has shown either incompetent representation or an irreconcilable conflict with defense counsel. We read the trial court's words as a reference to *Ortiz*'s holding that "when a criminal defendant makes a timely motion to discharge his retained attorney he should not be required to demonstrate the latter's incompetence, *as long as the discharge will not result in prejudice to the defendant* . . . ." (*People v. Ortiz, supra,* 51 Cal.3d at p. 979, italics added.) At least one Court of Appeal has expressed this aspect of *Ortiz* as: "A trial court need not permit a defendant to discharge retained counsel where . . . it would cause ' "significant prejudice" ' to the defendant, e.g., by forcing him to trial without adequate representation . . . ." (*People v. Turner* (1992) 7 Cal.App.4th 913, 918, italics added.) It appears the trial court here was stating a corollary conclusion: denying the request to discharge Ross would not prejudice Lewis by forcing him to trial with inadequate representation.

We are satisfied that, in adjudicating Lewis's request to discharge retained counsel, the trial court considered the appropriate factors.

(2) *The Lara decision.*

Lewis urges us to follow the result in *People v. Lara, supra,* 86 Cal.App.4th 139, which found a motion to discharge retained counsel, made on the first day of trial, was not untimely. But, as we shall explain, *Lara* cannot guide our analysis because it is nothing like the case at bar.

In *Lara*, two suspects tried to burglarize the home of Mr. T. and his family in December 1996. Michael Woodley was apprehended immediately, but the other suspect escaped. After Woodley implicated Lara as the second burglar, Mr. T. and his daughter identified Lara from a photo array. The preliminary hearing was not held until January 1998, and the trial was continued numerous times, sometimes because the prosecution was having difficulty securing the attendance of Mr. T. and his family.

It turned out they had left the state in connection with Mr. T.'s placement in a witness protection program on an unrelated case.

On the day the case was finally set for trial, Roberts, who was Lara's retained counsel, told the trial court Lara had something to say. Lara complained Roberts was not prepared to try the case and had not been consulting with him. Lara said, "I haven't . . . talked about this case at all for eight months. And now everything in one day is coming on top of me." (*People v. Lara, supra,* 86 Cal.App.4th at p. 147.) Roberts told the trial court Lara wanted to call Woodley as a witness, but that Roberts disagreed as a matter of tactics and also because he didn't know how to contact Woodley. Roberts said he had not been able to interview the other witnesses because they lived out-of-state. The trial court said there would still be time to subpoena and interview Woodley because the jury had yet to be selected. The court also said Mr. T. was supposed to be arriving in town that night.

Characterizing Lara's complaints as a *Marsden* motion, the trial court refused to let him discharge Roberts because their disputes were merely tactical. The Court of Appeal reversed, although not simply because the trial court had mischaracterized the legal basis for Lara's request. Rather, the crucial question was "whether the [trial] court's ruling on the supposed *Marsden* motion effectively addressed the issues it should have considered in the course of an *Ortiz* motion regarding retained counsel." (*People v. Lara, supra,* 86 Cal.App.4th at p. 156.)

The Court of Appeal concluded Lara's request was not necessarily untimely because it had been made just as trial was about to begin. The Court of Appeal pointed out "the criminal proceedings against appellant had been continued for nearly one and one-half years," and that "[w]hen the matter was finally assigned for trial, appellant immediately expressed his dissatisfaction with his retained counsel prior to . . . the commencement of jury selection." (*People v. Lara, supra,* 86 Cal.App.4th at p. 162.) The trial court denied Lara's request because his disagreement with Roberts had been merely tactical, not because his request to discharge Roberts had been untimely. The Court of Appeal concluded Lara's request was not untimely because "Mr. Roberts had

not consulted with appellant during the numerous continuances, and appellant was unaware of the nature of Mr. Roberts's preparation until the moment the trial was finally set to begin. Appellant was faced with the start of a trial in which he faced a possible third strike sentence, and he was clearly upset that counsel did not seem prepared. Under the circumstances, appellant informed the court of his concerns at the first possible opportunity." (*Id.* at p. 163.)

(3) *Lewis's request to discharge Ross was untimely*.

We conclude the result in *Lara* should have no bearing on the case at bar because *Lara*'s facts are so fundamentally different. Lewis's request to discharge retained counsel was untimely.

To start with, Lara complained about his retained counsel before trial began, whereas Lewis waited until the second day of jury selection. There is an obvious difference between the disruption caused by an eve-of-trial continuance and the disruption caused by having to order a new panel of prospective jurors because the selection process has been interrupted. (See *People v. Ortiz, supra*, 51 Cal.3d at p. 984 [orderly process of justice includes having to assemble witnesses, lawyers and jurors]; *People v. Rhines* (1982) 131 Cal.App.3d 498, 506 [request for continuance to obtain new defense counsel was untimely, in part, because defendant waited until second day of jury selection].)

Also, in contrast to *Lara*, there is no doubt the trial court here was very concerned about the ensuing disruption if it allowed Lewis to discharge Ross at such a late point in the proceedings. The record shows that when Lewis initially raised the issue, the *very first thing* the trial court said was his request was late because jury selection had already started. When Lewis returned to the courtroom after changing into civilian clothes, and then repeated his request to discharge Ross, the trial court *again* told him it was too late because the trial had already started. When Lewis protested, the trial court explained that without such a rule, a defendant could postpone a case forever by continually firing retained counsel on the eve of trial. Lewis himself, in his opening appellate brief, says:

"The court denied the motion saying it was too late in the proceedings to make any changes."[5]

Compared to Lara's situation, it appears Lewis had ample opportunity to make his request in a more timely manner. The record shows Lewis was in court with Ross on July 12, July 18, July 19 and July 20. The case was first called for trial on July 12, which means Lewis could have raised the issue well before jury selection started on July 23. Lewis argues he "was still considering taking a possible plea deal as late as" July 23, and that because he "made his final decision to go to trial within moments of the [start of jury selection] he was *then* forced to start assessing his attorney's readiness for trial." (Italics added.) But Lewis cites no authority or reasoned explanation for why he should be excused from the common human burden of making contingency plans.

Finally, we note that other circumstances in *Lara* were far different than here. Not only were the witnesses in *Lara* inaccessible, but defense counsel had not been in contact with the defendant for many months leading up to the trial. Here, on the other hand, the record shows Ross had been consulting with Lewis and that he had witnesses ready for trial (see *post*).

Given the lateness of Lewis's request, and the fact he had opportunities to make it earlier, the trial court properly applied the general rule that a motion to discharge retained counsel is untimely if made on the eve of trial, let alone if made after trial has already begun. (See *People v. Keshishian* (2008) 162 Cal.App.4th 425, 429 [request to discharge retained counsel made on day set for trial properly ruled untimely]; *People v. Turner, supra,* 7 Cal.App.4th at p. 919, fns. omitted ["Here defendant sought to replace his attorney on the day of trial. This meant that the request could not be granted without causing a significant disruption, i.e., a continuance with the attendant further inconvenience to witnesses and other participants."]; *People v. Lau* (1986)

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[5] It is only in his reply brief that Lewis backpedals by characterizing the trial court's statements as "passing comments."

177 Cal.App.3d 473, 479 ["Lau's request was made literally the moment jury selection was to begin. As evidenced by the court's comments . . . the timeliness, or lack thereof, of the request properly concerned the court."]; see also *People v. Hernandez* (2006) 139 Cal.App.4th 101, 109 [request to discharge retained counsel properly denied because "made almost immediately before jury selection was to begin in a two-defendant case"].)[6]

(4) *There was no good reason to grant Lewis's untimely request.*

Having properly found Lewis's request to discharge Ross was untimely, the trial court proceeded to follow *Ortiz*'s admonition that " 'a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.' " (*People v. Ortiz, supra,* 51 Cal.3d at p. 984.) That is, instead of rejecting Lewis's untimely request out of hand, the trial court considered his complaints and asked for a response from Ross. (See *People v. Keshishian, supra* 162 Cal.App.4th at p. 429 [trial court applied "correct standard in rejecting appellant's last-minute attempt to discharge counsel" by giving appellant opportunity to explain]; *People v. Turner, supra,* 7 Cal.App.4th at p. 919 [where defendant sought to replace retained counsel on day of trial, "question then became whether [the resulting disruption would be] reasonable under the circumstances"]; *People v. Lau, supra,* 177 Cal.App.3d

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[6] In his opening brief, Lewis predicated his argument on the assumption that granting his request to discharge Ross would have delayed the trial. In his reply brief, however, Lewis raises a new issue, claiming the trial court erred by not asking Lewis if he had another lawyer ready to take over the case. However, "[o]bvious reasons of fairness militate against consideration of an issue raised initially in the reply brief. [Citation.]" (*People v. King* (1991) 1 Cal.App.4th 288, 297, fn. 12; see *People v. Newton* (2007) 155 Cal.App.4th 1000, 1005 ["we do not consider an argument first raised in a reply brief, absent a showing why the argument could not have been made earlier"]; *Moore v. Shaw* (2004) 116 Cal.App.4th 182, 200, fn. 10 ["Ordinarily, an appellant's failure to raise an issue in its opening brief waives the issue on appeal."].) In any event, it seems obvious the trial would have had to be continued if Lewis's request had been granted. (See, e.g., *People v. Hernandez, supra,* 139 Cal.App.4th at p. 109 [where request to discharge retained counsel "made almost immediately before jury selection . . . . [i]t is almost inconceivable that [substitute counsel] would be able and willing to defend the case without a material postponement"].)

at p. 479 ["Recognizing the importance of defendant's right to counsel of his choice, however, the [trial] court did not rely solely on the untimeliness of Lau's request" but "nonetheless considered Lau's remarks regarding his disagreement with counsel"].)

But when the trial court asked Lewis why he wanted new counsel, Lewis was no more specific than saying Ross had lied to him "the whole time" "about a whole lot of stuff," and that he "hasn't done anything." Ross responded by describing the work he had done on the case, which included providing copies of the police report and the preliminary hearing transcript to Merritt, analyzing the evidence against Lewis and possible sentencing options, and giving Lewis his evaluation. According to Ross, his relationship with Lewis soured when Ross refused to file unwarranted pretrial motions. The clerk's transcript corroborates Ross's assertion he had been working on the case because it shows that, at one point, Merritt and another witness (apparently Lewis's grandfather) were scheduled to testify.[7]

The trial court did not abuse its discretion by denying Lewis's request to discharge his retained counsel.

2. *New trial motion was properly denied.*

Lewis contends the trial court erred by refusing to grant his motion for new trial due to ineffective assistance of counsel. This claim is meritless.

a. *Background.*

Following his guilty verdict, Lewis replaced Ross with another attorney, who then filed a motion for new trial claiming Ross had been ineffective for not using Lewis's sister, Monique, as a defense witness. A supporting declaration from Merritt asserted Ross had been informed that Monique first took the Remington shotgun to the Budlong duplex on February 4, *after* Lewis's confrontation with the repossessors.
In her declaration, Monique asserted she had been prepared to so testify, but Ross never contacted her.

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[7] The minute order for July 12 states: "Defense witnesses Forever Merritt and Payton Amicker are ordered to report to Department 118 on July 18."

The trial court denied the new trial motion, saying: "[I]n the court's mind, it wasn't much of an issue. It was a small issue, or I'd say an issue, but not a lingering question that [Lewis] had a firearm, a long firearm, and it was . . . identified in court and before the jury. [¶] So I'm not quite sure what affect [*sic*] calling this particular witness would have had on the outcome." "[H]aving heard the evidence, I don't believe that the outcome would have been different had that witness . . . testified. [¶] And I would agree with the district attorney that the case was a strong case . . . the tow truck drivers . . . were quite believable." "[W]henever you have a relative under this particular circumstance testify, it becomes a problematic situation, especially in view of the prosecution witnesses and the believability of that defendant witness [i.e., Merritt]."

b. *Legal principles.*

"A trial court has broad discretion in ruling on a motion for a new trial, and there is a strong presumption that it properly exercised that discretion. ' "The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." ' [Citation.]" (*People v. Davis* (1995) 10 Cal.4th 463, 524.)

A claim of ineffective assistance of counsel has two components: " 'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' [Citation.] [¶] To establish ineffectiveness, a 'defendant must show that counsel's representation fell below an objective standard of reasonableness.' [Citation.] To establish prejudice he 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*Williams v. Taylor* (2000) 529 U.S. 362, 390-391 [120 S.Ct. 1495].)

Defense counsel's mere failure to interview or call available witnesses is generally insufficient to demonstrate ineffective assistance of counsel. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1215 [deference is shown to counsel's tactical choices]; *People v. Floyd* (1970) 1 Cal.3d 694, 710, disapproved on other grounds by *People v. Wheeler* (1978) 22 Cal.3d 258, 287, fn. 36 [ineffective assistance of counsel not established merely by showing defense counsel failed to interview and call all available witnesses]; *People v. Knight* (1987) 194 Cal.App.3d 337, 345 ["choice of which, and how many, potential witnesses to interview or call to trial is precisely the type of choice which should not be subject to review by an appellate court"].)

"Although trial counsel clearly has a duty to adequately investigate possible defenses to enable formulation of an informed trial strategy [citation], we will not presume from a silent record that counsel failed in this duty. [Citations.]" (*People v. Jennings* (1991) 53 Cal.3d 334, 375.) "In some cases . . . the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged. In such circumstances, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, these cases are affirmed on appeal. [Citation.] Otherwise, appellate courts would become engaged 'in the perilous process of second-guessing.' " (*People v. Pope* (1979) 23 Cal.3d 412, 426, fn. omitted, disapproved on another ground in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10.)

"The trial judge is the one best situated to determine the competency of defendant's trial counsel. Where, as here, defendant is represented by different counsel at the motion for a new trial and the issue is called to the trial court's attention, the trial judge's decision is especially entitled to great weight and we defer to his fact finding power." (*People v. Wallin* (1981) 124 Cal.App.3d 479, 483.)

c. *Discussion*.

Lewis acknowledges the rule against second-guessing trial counsel's tactical choices, but argues Ross could not have made an informed tactical decision about using Monique as a witness because he never interviewed her. He also argues that, by concluding Monique's testimony "would also have been weak, like [Merritt's], rather than strong like the . . . tow truck driver witnesses," the trial court improperly substituted its "own assessment for the judgment of a jury who never got to hear [Monique] speak for herself."

We disagree that Ross could not have made an informed tactical decision without interviewing Monique. He knew she was Lewis's sister and that she would, therefore, have an inherent credibility problem. He also knew her testimony would have been cumulative to Merritt's testimony that Monique gave her the shotgun after Lewis's confrontation with the repossessors. This was sufficient information on which to make a tactical decision not to use Monique at trial.

In any event, even assuming arguendo Lewis had shown that Ross should have used Monique, he would not have been able to demonstrate any resulting prejudice. The evidence against him was overwhelming. As the trial court commented, the prosecution put on a very strong case. The victims' testimony was completely believable, whereas Merritt's testimony was not. Contrary to Lewis's argument, it was part of the trial court's job to assess the credibility of the various witnesses. (See *In re Hardy* (2007) 41 Cal.4th 977, 1021-1022 ["[Defense counsel's] failure to present reasonably available [exculpatory] evidence . . . would not require relief on the ground of ineffective assistance unless his deficient performance was prejudicial. [Citation.] In this context, we assess prejudice by evaluating three factors: What evidence was available that counsel failed reasonably to discover? How strong was that evidence? How strong was the evidence of guilt produced at trial?"].)

Lewis tries to disparage the prosecution evidence by arguing the victims "were in the business of repossessing cars and had already . . . previously repossessed the same car from appellant. It was not surprising that they may have disliked appellant. Obviously,

this time the repossession did not go smoothly for them, and one of them ended up walking into a tree. They had every incentive to exaggerate the details of the incident." But this is mere speculation. Lewis points to no evidence showing the victims felt any particular animosity toward him. Indeed, Collins had testified it was quite common for repossessors to have to deal with irate car owners, even ones who pulled guns. Lewis's suggestion the victims might have subsequently invented the gun story to retaliate against Lewis is not only pure speculation, but it is undercut by the fact Daywalt called 911 while the incident was still unfolding.

Lewis also questions the gun identification evidence, arguing: "Tow truck driver Lloyd Collins, a self described gun collector who recognizes guns, testified that on the day of the incident appellant pointed a 'long rifle' at him. After being presented with the Remington 870 shotgun recovered from the second search of the Budlong residence, Collins told the police it was the same weapon appellant had pointed at him. Certainly a gun collector would be expected to immediately recognize the difference between a shotgun and a rifle." This argument ignores Detective Mossie's testimony you cannot tell the difference between a rifle and a shotgun without looking inside the barrel.

On the other hand, Merritt's testimony was not strong. She had an inherent credibility problem given her relationship with Lewis. Her attempts to establish she, but not Lewis, lived at the Budlong duplex were feeble. She did not testify Lewis had been unarmed during the incident. And her explanation for why Monique wanted her to take care of the shotgun, an explanation Monique was prepared to corroborate, had its own problems. Monique supposedly wanted to get the gun out of her house to keep it away from her young children. Merritt testified Monique's "sons are old enough to where they can go into her closet and look and find things." However, not only did Merritt herself have a five or six-year-old child at that time, but the gun was found on the floor of a bedroom closet where the child's clothing was kept.

Moreover, even assuming arguendo Monique's testimony would have convinced the jury that Collins and Daywalt had misidentified Lewis's gun as Monique's Remington, a reasonable jury would have probably concluded that explanation just meant the gun Lewis actually used had never been found. A reasonable jury would not have gone on from the misidentification to conclude that Collins and Daywalt were lying when they testified Lewis had threatened them with a long gun.

Because Lewis could not show there had been ineffective assistance of counsel, the trial court did not abuse its discretion by denying his new trial motion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.